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TRUE TO THE FABLE?: EXAMINING THE APPROPRIATE REACH OF CAT'S PAW LIABILITY

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INTRODUCTION

Since the early 1900s, Congress has enacted legislation to deter discrimination in the workplace and provide remedies for discrimination victims.¹ All of the antidiscrimination acts prohibit employers from making employment decisions, such as hiring and firing, based on certain prohibited characteristics.² To succeed with an employment discrimination claim, plaintiffs must ultimately prove that

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¹ Among such legislation is Title VII of the Civil Rights Act, which prohibits employers from discriminating against employees on the basis of their race, color, religion, sex or national origin. 42 U.S.C. § 2000(e)–2000(e)–17 (2006). Likewise, the Age Discrimination in Employment Act (ADEA) prohibits employers from discriminating on the basis of age. 29 U.S.C. §§ 621–634 (2006). The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. 42 U.S.C. §§ 12101–12213 (2006). A similar, though less well-known, piece of federal antidiscrimination legislation is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits adverse action based on association with the military. 38 U.S.C. §§ 4301–4333 (2006).

² Taran S. Kaler, Comment, *Controlling the Cat's Paw: Circuit Split Concerning the Level of Control a Biased Subordinate Must Exert over the Formal Decisionmaker's Choice to Terminate*, 48 SANTA CLARA L. REV. 1069, 1070 (2008).

they were the victims of intentional discrimination.³ Yet this decisive issue begs the question of who must possess the discriminatory intent. Liability certainly exists when plaintiffs demonstrate that an employer, as defined by statute,⁴ took an adverse employment action because of discriminatory animus. But because the antidiscrimination statutes also extend liability to actions taken by an employer's agent,⁵ plaintiffs can also hold employers vicariously liable.⁶

In today's modern workplace, it is quite common to hold employers responsible for the actions of their agents. Employers are typically large corporate entities, and the principal employer rarely personally effectuates employment decisions against plaintiffs so as to be held directly liable.⁷ Instead, the employer's agent likely made the discriminatory decision, and the plaintiff is attempting to hold the principal employer vicariously liable. Agents are commonly supervisory employees who possess delegated authority to alter the employment terms of lower-level employees.⁸ Thus, employers can be held liable, whether directly or vicariously, when they or their agents take an adverse employment action against an employee with a prohibited discriminatory intent.

However, under the colorfully-named cat's paw doctrine, plaintiffs can also succeed when an employee involved in the decisionmaking process, besides the actual decisionmaker, had

³ Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000).

⁴ 42 U.S.C. § 2000e(b) (Title VII definition of "employer"); 29 U.S.C. § 630(b) (ADEA definition of "employer"); 42 U.S.C. § 12111(5)(A)–(B) (ADA definition of "employer").

⁵ 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b); 42 U.S.C. § 12111(5)(A)–(B).

⁶ See generally Burlington Indus. Inc. v. Ellerth, 524 U.S. 742 (1998) (discussing issue of vicarious liability in the employment discrimination context).

⁷ Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 495–96 (2001); Natasha T. Martin, *Immunity for Hire: How the Same-Actor Doctrine Sustains Discrimination in the Contemporary Workplace*, 40 CONN. L. REV. 1117, 1144 (2008).

⁸ Stephen F. Befort & Alison L. Olig, *Within Grasp of the Cat's Paw: Delineating the Scope of Subordinate Bias Liability Under Federal Antidiscrimination Statutes*, 60 S.C. L. REV. 383, 384 (2008).

discriminatory intent.⁹ The cat's paw theory of liability emerged to account for the fact that employers' decisionmaking processes have become more complicated and discriminatory motives can exist at various levels.¹⁰ Large employers have established a decisionmaking hierarchy that has many layers of supervisory employees.¹¹ Employment decisions are rarely made by a single individual; instead, decisions are made based upon the input of several different people.¹² Higher-level supervisory employees may have to make decisions about employees that they do not personally know or have never even met.¹³ Consequently, supervisors must rely on information, recommendations and evaluations provided by subordinate employees when making personnel decisions.¹⁴

In this context, cat's paw liability "refers to a situation in which a biased subordinate, who lacks decisionmaking power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action."¹⁵ Although the cat's paw doctrine was first introduced into employment discrimination law in 1990,¹⁶ it actually derives its name from French poet Jean de La Fontaine's seventeenth century fable "The Monkey and the Cat."¹⁷ As the tale goes, a monkey convinces an unsuspecting cat to scoop chestnuts from

⁹ See, e.g., *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484–85 (10th Cir. 2006).

¹⁰ *BCI Coca-Cola*, 450 F.3d at 488.

¹¹ Martin, *supra* note 7, at 1144.

¹² White & Krieger, *supra* note 7, at 495–96.

¹³ Sara Eber, Comment, *How Much Power Should Be in the Paw?: Independent Investigations and the Cat's Paw Doctrine*, 40 LOY. U. CHI. L.J. 141, 142 (2008).

¹⁴ Phillip J. Fowler, *Employment Cases and the "Cat's Paw" Theory*, 22 JAN. CBA REC. 44 (2008).

¹⁵ *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir. 2006).

¹⁶ *Shager v. Upjohn Co.*, 913 F.2d 398, 404–05 (7th Cir. 1990).

¹⁷ See *BCI Coca-Cola*, 450 F.3d at 484 (citing Gustave Dore, *FABLES OF LA FONTAINE* 344 (Walter Thornbury trans., Chartwell Books 1984)).

a hot fire.¹⁸ The cat agrees and pulls chestnuts out one by one, burning his paw in the process.¹⁹ At the same time, the monkey eagerly eats all the chestnuts and leaves none for the cat.²⁰ In today's society, the phrase cat's paw generally means "one used by another to accomplish his purpose."²¹

Recently, cat's paw liability has become an issue of particular interest in employment law.²² Since its introduction, nearly all United States Courts of Appeal have recognized and adopted the cat's paw doctrine.²³ However, the circuit courts disagree about how much control the biased employee must possess over the decisionmaker to impose liability on the employer.²⁴ Several circuit courts have adopted a lenient standard that requires the biased employee to exercise "influence" over or provide "input" to the decisionmaker.²⁵ In contrast, the Fourth Circuit has adopted a stringent rule that the biased employee must be principally responsible so as to be considered the actual decisionmaker.²⁶ The Fourth Circuit refuses to impose liability even if the biased employee exercised "substantial influence" over the decisionmaker.²⁷ Falling between these two extremes, the Tenth Circuit focuses on whether the biased employee "caused" the adverse

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* (quoting Webster's Third New International Dictionary Unabridged 354 (2002)).

²² Sean Ratliff, Comment, *Independent Investigations: An Inequitable Out for Employers in Cat's Paw Cases*, 80 U. COLO. L. REV. 255, 258 (2009).

²³ *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 486 (10th Cir. 2006).

²⁴ *Id.*

²⁵ *See, e.g., Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d. Cir. 2001) (stating "[u]nder our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate").

²⁶ *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 289 (4th Cir. 2004) (en banc).

²⁷ *Id.*

employment action.²⁸ Yet the Tenth Circuit did not elaborate on what standard of causation was required. After introducing the cat's paw theory, the Seventh Circuit has applied the doctrine inconsistently. At times, the Seventh Circuit has used a causation based standard, while in other cases the court has applied a more lenient standard. Most recently, the Seventh Circuit adopted a "singular influence" standard that closely aligns with the Fourth Circuit's strict rule.

In 2006, the Supreme Court of the United States granted certiorari to hear a cat's paw case and to decide whether an employer can be held liable for a subordinate's discriminatory animus when the ultimate decisionmaker harbored no discriminatory motive.²⁹ The Supreme Court's grant of certiorari garnered increased attention to the circuit split, and the legal community anticipated that the case's outcome would profoundly impact the cat's paw doctrine.³⁰ However, less than one week before oral argument was scheduled to be heard, the Supreme Court granted the employer's motion to dismiss.³¹ Therefore, without guidance from the Supreme Court, the circuit split regarding cat's paw liability continues.³²

Part I of this comment will describe the legal background and origins of the cat's paw theory of employment discrimination. Part II will then delve into the current circuit split, examining the varying approaches used to determine liability. Part III will specifically examine the Seventh Circuit's unclear cat's paw precedent and its recent shift to a stricter standard. Part IV will argue that the courts

²⁸ *BCI Coca-Cola*, 450 F.3d at 487.

²⁹ *BCI Coca-Cola Bottling Co. v. EEOC*, 450 F.3d 476 (10th Cir. 2006), *cert. granted*, 549 U.S. 1105 (2007).

³⁰ Angelo J. Genova & Francis J. Vernoia, *Practical Considerations from Recent Development in Employment Law: An Analysis of Murphy v. IRS, the "Cat's Paw" Doctrine and Comparative Obligations Under the Faragher and Ellerth Affirmative Defense*, PRAC. L. INST., *Litigating Employment Discrimination Claims* 2007, June 2007, at 9, 20, 22.

³¹ *BCI Coca-Cola Bottling Co. v. EEOC*, 450 F.3d 476 (10th Cir. 2006), *cert. dismissed*, 549 U.S. 1334 (2007).

³² See Ratliff, *supra* note 22, at 260.

should adopt the motivating factor standard of causation, should more carefully scrutinize whether an independent investigation breaks the causal chain, and should apply agency principles as a proper limitation on liability.

I. CAT'S PAW LIABILITY: LEGAL BACKGROUND AND ORIGINS

A. *Fundamentals of Employment Discrimination Law: Causation and Agency*

A critical issue in employment discrimination law involves the element of causation. The antidiscrimination statutes prohibit employers from engaging in intentional discrimination, which has come to be referred to as disparate treatment.³³ Plaintiffs bringing disparate treatment claims must ultimately prove that the employer made the adverse employment decision because of a prohibited characteristic.³⁴ Yet wide dispute exists regarding the appropriate standard of causation.³⁵ Courts, commentators, and legislators have utilized a variety of “phrases and formulations to describe the causation requirement in disparate treatment doctrine.”³⁶ In terms of statutory language, the antidiscrimination acts require plaintiffs to prove that the adverse employment action was taken “because of” the plaintiff’s membership in a protected class.³⁷ Although the “because of” language certainly establishes a causation requirement, the phrase

³³ Curtis J. Thomas, Note, *Cat's in the Cradle: Tenth Circuit Provides Silver Spoon of Subordinate Bias Liability* in *EEOC v. BCI Coca-Cola Bottling Co. of Los Angeles*, 61 OKLA. L. REV. 629, 633 (2008).

³⁴ See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

³⁵ White & Krieger, *supra* note 7, at 504.

³⁶ Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 500 (2006) [hereinafter Katz I]. For example, the Supreme Court used over twenty different formulations to describe the causation requirement in *Price Waterhouse v. Hopkins*. *Id.* at 491.

³⁷ Rachel Santoro, *Narrowing the Cat's Paw: An Argument for a Uniform Subordinate Bias Liability Standard*, 11 U. PA. J. BUS. L. 823, 831 (2009).

does not inherently dictate what the standard of causation should be.³⁸ Consequently, uncertainty regarding the causation requirement has developed and burdened disparate treatment law on a macro level.³⁹

Nonetheless, two evidentiary methods have developed to assist plaintiffs in meeting the ultimate burden of proving intentional discrimination.⁴⁰ First, plaintiffs can use the *McDonnell Douglas* burden-shifting framework.⁴¹ This approach requires plaintiffs to establish a prima facie case of discrimination, which consists of four elements: (1) membership in a protected class, (2) qualification for the job, (3) an adverse employment decision, and (4) circumstances indicating that the protected class membership caused the adverse employment action.⁴² If the plaintiff proves these elements, then the burden shifts to the employer to offer a legitimate non-discriminatory reason for the adverse employment action.⁴³ If the employer is able to offer a legitimate reason, the plaintiff must show that the offered reason was merely pretext.⁴⁴ At this point, the burden of proving

³⁸ Katz I, *supra* note 36, at 491.

³⁹ *Id.* at 493.

⁴⁰ *Befort & Olig*, *supra* note 8, at 398. Courts traditionally have utilized the mixed-motive framework when plaintiffs present direct evidence of discrimination and used the *McDonnell Douglas* framework when presented with circumstantial evidence of discrimination. *Id.* at 399–400. However, the Supreme Court's decision in *Desert Palace, Inc. v. Costa* has called this dichotomy into question. *Id.* at 400. *Desert Palace* held that plaintiffs are not required to present direct evidence of discrimination and thus definitely alters the mixed-motive framework. But the circuit courts have disagreed as to whether *Desert Palace* changed the *McDonnell Douglas* framework as well. *Id.*

⁴¹ Thomas, *supra* note 33, at 634.

⁴² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (2000); *Dyke v. O'Neal Steel, Inc.*, 327 F.3d 628, 631 (7th Cir. 2003).

⁴³ *McDonnell Douglas*, 411 U.S. at 802.

⁴⁴ *Id.* In this context, pretext “means a lie, specifically a phony reason for some action . . . [P]retext for discrimination means more than an unusual act; it means something worse than a business error; ‘pretext’ means deceit used to cover one’s tracks.” *Millbrook v. IBP, Inc.*, 280 F.3d 1169, 1175 (7th Cir. 2002) (internal quotations and citations omitted).

pretext “merges with the ultimate burden of persuading the court that [the plaintiff] has been the victim of intentional discrimination.”⁴⁵

Second, plaintiffs can proceed under the “mixed-motives” framework.⁴⁶ The mixed-motives framework was originally established in *Price Waterhouse v. Hopkins*, and this method allows plaintiffs to bring claims when the employer was motivated by both permissible and forbidden reasons.⁴⁷ The *Price Waterhouse* plurality concluded that the phrase “because of” did not require “but-for” causation.⁴⁸ Instead, the Court interpreted “because of” to mean that the decision was motivated, in whole or in part, by the prohibited characteristic.⁴⁹ Therefore, the plaintiff only needed to show that the prohibited characteristic was a motivating factor in the employer’s decision.⁵⁰ If the plaintiff produces such discriminatory evidence, then the burden shifts to the employer. Historically, under *Price Waterhouse*, the employer could escape liability by demonstrating that it would have made the same decision even without the discriminatory bias.⁵¹

In response to the *Price Waterhouse* decision, Congress enacted the 1991 Amendments to Title VII. Congress amended the *Price Waterhouse* rule that allowed employers to avoid liability with such proof.⁵² Now, employers can use proof that it would have taken the same action despite discriminatory bias only to limit the remedies available to the plaintiff.⁵³ Congress simultaneously codified the rule

⁴⁵ Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981).

⁴⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 249 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(m) (2006)).

⁴⁷ *Id.*

⁴⁸ *Id.* at 240 (stating “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for’ causation is to misunderstand them”).

⁴⁹ *Id.*

⁵⁰ See U.S.C. § 2000e-2(m); *Price Waterhouse*, 490 U.S. at 241.

⁵¹ See *Price Waterhouse*, 490 U.S. at 276 (O’Connor, J., concurring); Befort & Olig, *supra* note 8, at 399–400.

⁵² See 42 U.S.C. § 2000e-2(m); 42 U.S.C. § 2000e-5(g)(2)(B).

⁵³ 42 U.S.C.A. § 2000e-5(g)(2)(B).

that plaintiffs only needed to show that their protected class played a “motivating factor” in the employment decision.⁵⁴ In sum, the motivating factor test governs whether the conduct in question constitutes a violation of Title VII while, as a result, the same action test controls the type of compensation available to the victim.⁵⁵

Notably, Congress enacted the motivating factor and same action formulations only in relation to Title VII, raising questions as to whether these formulations applied to the other antidiscrimination statutes.⁵⁶ Just recently, however, the Supreme Court held that the motivating factor test did not apply to disparate treatment claims brought pursuant to the ADEA.⁵⁷ In a 5-4 decision, a majority of the Court decided that the ADEA’s “because of” language required plaintiffs to prove that age was the “but-for” cause of the adverse employment action.⁵⁸ Regrettably, this decision adds further uncertainty to the already jumbled state of the causation requirement in disparate treatment law.

In cat’s paw cases, plaintiffs can use either evidentiary framework.⁵⁹ A plaintiff proceeding under the *McDonnell Douglas* framework may demonstrate that the employer’s alleged legitimate reason is actually pretext for a subordinate’s discriminatory motives.⁶⁰ Alternatively, a plaintiff using the mixed-motives framework must show that, even though a legitimate reason may have existed for the decision, the subordinate’s bias played a motivating role in the employment action.⁶¹ Yet regardless of which evidentiary method is

⁵⁴ Specifically, Section 107 provides that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m) (2006).

⁵⁵ Katz I, *supra* note 36, at 492–94.

⁵⁶ *Id.* at 492–93.

⁵⁷ Gross v. FBL Financial Services, Inc., 129 S.Ct. 2343, 2349–51 (2009).

⁵⁸ *Id.* at 2352.

⁵⁹ Befort & Olig, *supra* note 8, at 401.

⁶⁰ *Id.*

⁶¹ *Id.*

used, the ultimate question remains “whether the plaintiff was the victim of intentional discrimination.”⁶²

In addition to the element of causation, another important issue concerns the scope of vicarious liability under the antidiscrimination statutes. All of the statutes protect against discrimination committed by an employer and its agents.⁶³ The Supreme Court has observed that the agency language “surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible.”⁶⁴ Accordingly, an employer cannot be held liable for every employee’s actions, but only for those employees that can be considered agents. To determine the proper scope of vicarious liability, Congress has directed courts to utilize common law agency principles.⁶⁵

In *Burlington Industries, Inc. v. Ellerth*, the Supreme Court followed Congress’ direction when it used agency principles to consider when an employer can be held vicariously liable for its supervisors’ actions.⁶⁶ The Supreme Court began by referencing the well-established agency principle that employers are vicariously liable for the torts committed by employees acting within the scope of their employment.⁶⁷ To be within the scope of employment, the employee’s action must be motivated, at least in part, by a desire to serve the

⁶² *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000).

⁶³ 42 U.S.C. § 2000e(b) (2006). Title VII defines employer as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person.” 42 U.S.C. § 2000e(b).

⁶⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

⁶⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 791–792 (1998); *see also Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 754 (1998).

⁶⁶ 524 U.S. at 754. Specifically, the Court addressed the issue of “whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate’s terms or conditions of employment, based on sex, but does not fulfill the threat.” *Id.*

⁶⁷ *Ellerth*, 524 U.S. at 755–56 (citing RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957)).

employer.⁶⁸ Generally, an employee's discriminatory bias does not constitute conduct that serves the employer's business.⁶⁹ However, the Supreme Court recognized that an exception to the scope of employment rule exists.⁷⁰ Specifically, employers are liable when the employee was "aided in accomplishing" the discriminatory act "by the existence of the agency relation."⁷¹ The Supreme Court stated that the mere existence of the employment relationship was not enough for this exception to apply; instead, the supervisory employee must be able to take a tangible employment action against the subordinate.⁷² The Supreme Court defined a tangible employment action as an action that "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁷³ The employer's delegation of responsibility to the supervisory employee warrants vicarious liability.⁷⁴ Thus, if the biased supervisory employee personally makes the decision, the employer will be vicariously liable for the supervisor's intentional discrimination. Such a scenario, however, does not constitute a cat's paw case.⁷⁵

Unlike the biased employee in a typical vicarious liability case, the employee in a cat's paw case does not make the official decision.

⁶⁸ *Id.* at 756 (citing RESTATEMENT (SECOND) OF AGENCY §§ 228(1)(c), 230 (1957)).

⁶⁹ *See id.* at 757.

⁷⁰ *Id.* at 758.

⁷¹ *Id.* at 758 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (1957)).

⁷² *Id.* at 760.

⁷³ *Id.* at 761. The Court did not define the outer contours of what constitutes a "tangible employment action." *Id.* at 762–63. Some courts have interpreted it to require a materially adverse action. White & Krieger, *supra* note 7, at 521. One commentator has suggested that it should include any action that "a supervisor's status as supervisor enables him to take." *Id.*

⁷⁴ Brief of Respondent at 18–19, *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006) (No. 06–341), *cert. dismissed*, 549 U.S. 1334 (2007).

⁷⁵ Eber, *supra* note 13, at 152.

Rather, the biased employee uses his ability to make evaluations and recommendations to trigger the actual decisionmaker to take the adverse action. In this context, courts impute the biased employee's discriminatory intent to the actual decisionmaker, even when the actual decisionmaker is bias-free. Nonetheless, the agency principles associated with vicarious liability and *Ellerth* still serve to limit liability in cat's paw cases, and courts often fashion the cat's paw doctrine based on these principles.⁷⁶

B. Shager v. Upjohn: The Introduction of the Cat's Paw Doctrine

In 1990, Judge Richard Posner introduced the cat's paw doctrine into employment discrimination law.⁷⁷ The Seventh Circuit relied on causation and agency principles to conclude that an employer can be liable based on a subordinate employee's discriminatory intent, even when the actual decisionmaker was admittedly-bias free.⁷⁸ In *Shager v. Upjohn Co.*, fifty-year old Ralph Shager argued that his former employer, Asgrow, should be liable for the alleged age-based animus of its manager, John Lehnst.⁷⁹ Lehnst was Asgrow's youngest district manager, and he supervised Shager and other sales representatives.⁸⁰ Soon after starting at the company, Lehnst divided the Wisconsin territory into two sections and assigned the more difficult section to Shager.⁸¹ Lehnst later decided to hire a third sales representative for the Wisconsin territory, even though the territory was not generating enough business to justify a third position.⁸² Lehnst hired Schradel, a twenty-nine year old, for the position and assigned Schradel to the best

⁷⁶ Ali Razzaghi, Comment, *Hill v. Lockheed Martin Logistics Management, Inc.: "Substantially Influencing" the Fourth Circuit to Change its Standard for Imputing Employer Liability for the Biases of a Non-Decisionmaker*, 73 U. CIN. L. REV. 1709, 1714 (2005); Eber, *supra* note 13, at 152–53.

⁷⁷ *Shager v. Upjohn Company*, 913 F.2d 398, 404–05 (7th Cir. 1990).

⁷⁸ *Id.*

⁷⁹ *Id.* at 399.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

section while Shager retained the worst section.⁸³ Despite the difference in sales potential between the two sections, Shager's total sales far exceeded Schrader's total sales.⁸⁴ Yet Lehnst inexplicably gave both sales representatives only marginal reviews and even made excuses for Schrader's performance.⁸⁵ Lehnst later placed Shager on probation for alleged problems collecting accounts receivable and managing salesmen.⁸⁶ When the problems continued, Lehnst recommended to the company's "Career Path Committee" that Shager be terminated.⁸⁷ In July of 1986, the Career Path Committee fired Shager.⁸⁸

Subsequently, Shager sued his former employer under the ADEA,⁸⁹ alleging that he was terminated because of his age.⁹⁰ Shager presented evidence that Lehnst was biased against older workers.⁹¹ Lehnst was apparently troubled by the age difference between himself and his subordinates, many of whom were in their fifties. On one occasion, Lehnst asked a potential employee whether he would mind being supervised by a younger man.⁹² Lehnst also told a younger employee that "[t]hese older people don't much like or much care for us baby boomers, but there isn't much they can do about it."⁹³ Additionally, Lehnst exaggerated the reasons for putting Shager on probation and later recommending his termination.⁹⁴ Likewise, Lehnst curiously gave Shager a low evaluation, despite Shager's exceptional

⁸³ *Id.* at 399–400.

⁸⁴ *Id.* at 400.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 29 U.S.C. §§ 621–634 (2006).

⁹⁰ *Shager*, 913 F.2d at 400.

⁹¹ *Id.*

⁹² *Id.* at 399.

⁹³ *Id.* at 400.

⁹⁴ *Id.*

sales record.⁹⁵ And during Shradel's first evaluation, Lehnst commented on how "refreshing" it was to work with a "young man."⁹⁶ Based on this evidence, Shager argued that the deficiencies triggering his termination were merely pretext for Lehnst's discriminatory motive.⁹⁷

On appeal, the Seventh Circuit considered whether Lehnst's bias could be imputed to Asgrow.⁹⁸ Asgrow argued that the neutral Career Path Committee, which apparently did not harbor any animosity toward older workers, shielded itself from Lehnst's discrimination.⁹⁹ Initially, the Seventh Circuit discussed the common law agency principle that employers are liable for their supervisory employees' discriminatory acts taken within their scope of authority.¹⁰⁰ Yet that principle would hold Asgrow liable only if Lehnst had actually fired Shager.¹⁰¹ But, after all, the Career Path Committee made the official termination decision, not Lehnst.¹⁰²

However, the court proceeded to intensely examine the official decision, and, from this, the cat's paw theory emerged. The Seventh Circuit concluded that the innocence of the Career Path Committee could not protect the company if the committee had acted "as the conduit of Lehnst's prejudice—his cat's paw."¹⁰³ The court observed that Lehnst's bias and inaccurate portrayal of Shager's performance "tainted" and "influenced" the committee's decision to fire Shager.¹⁰⁴ Indeed, personnel committees often defer to a manager's judgment because managers are in a better position to evaluate lower level

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 401.

⁹⁸ *Id.* at 404.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 404–05.

¹⁰¹ *Id.* at 405.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

employees.¹⁰⁵ Given that the committee's meeting regarding Shager's termination was essentially perfunctory, Lehnst's influence may have been decisive.¹⁰⁶ As a result, Lehnst would have caused Shager's discharge through his evaluations and recommendation.¹⁰⁷ The Seventh Circuit concluded that Lehnst's discriminatory action would be in violation of the ADEA and could be imputed to the company.¹⁰⁸ If the rule were otherwise, "the establishment of corporate committees authorized to rubber stamp personnel actions would preclude a finding of willfulness no matter how egregious the actions in question."¹⁰⁹

C. Cat's Paw Cases Generally

Since *Shager*, nearly all of the circuit courts have followed the Seventh Circuit's lead and adopted the cat's paw doctrine. Although the Supreme Court has never endorsed the doctrine formally, it did recognize cat's paw liability in principle in *Reeves v. Sanderson Plumbing Products, Inc.*¹¹⁰ In *Reeves*, the plaintiff did not present any evidence that the official decisionmaker was biased.¹¹¹ Rather, the plaintiff showed that his supervisor, who did exhibit age-based animus, recommended the adverse employment action to the official decisionmaker.¹¹² The biased supervisor happened to be the official decisionmaker's husband and was described as yielding "absolute power" within the company.¹¹³ The Supreme Court characterized the plaintiff's evidence as showing that the biased supervisor was effectively the "actual decisionmaker" and was "principally

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 406.

¹¹⁰ *See generally* 530 U.S. 133 (2000).

¹¹¹ *See id.* at 146.

¹¹² *Id.*

¹¹³ *Id.* at 151–52.

responsible” for the termination decision.¹¹⁴ As such, even though the official decisionmaker was bias-free, the Supreme Court upheld the jury verdict finding the employer liable based on the biased supervisor’s actions.¹¹⁵

Although *Reeves* supports the doctrinal underpinnings of cat’s paw liability, its factual scenario represents only one type of cat’s paw case. At the *Reeves* end of the spectrum, the ultimate decisionmaker merely acts as a rubber stamp.¹¹⁶ That is, the biased employee acts as the de facto decisionmaker, even though an individual “higher in the organizational hierarchy actually fire[s] the plaintiff.”¹¹⁷ In this context, courts can quickly impose liability on the employer based on the biased employee’s unlawfully motivated actions.¹¹⁸ Similarly, “if the ultimate decisionmaker is aware that the recommendation was improperly motivated, then imposing liability on the employer readily follows.”¹¹⁹

But cat’s paw cases differ in regard to the degree of control the biased employee exercises over the employment decision and, accordingly, they often become highly fact-intensive.¹²⁰ Cat’s paw cases are more difficult when the ultimate decisionmaker does not simply rubber stamp the biased employee’s recommendation, yet does consider it when making the final decision.¹²¹ The employee’s bias

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 512.

¹¹⁶ White & Krieger, *supra* note 7, at 511–512. The rubber stamp terminology refers to the situation where the decision maker “gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.” *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 484 (10th Cir. 2006).

¹¹⁷ White & Krieger, *supra* note 7, at 511–12.

¹¹⁸ *Id.* at 512.

¹¹⁹ *Id.*

¹²⁰ Loren Gesinsky & Douglas B. Lipsky, *When the Subordinate’s Bias Matters*, 237 N.Y.L.J. 10 (May 21, 2007) (noting that the current circuit split may be explained by the “unique bundle of facts in each case that must be sifted and weighed in order to determine whether an employer’s complained of action occurred under circumstances giving rise to an inference of discrimination”).

¹²¹ White & Krieger, *supra* note 7, at 512.

may be exhibited in many forms and may taint the ultimate decision in many ways.¹²² For example, the biased subordinate might deprive the ultimate decisionmaker of accurate data upon which to base its decision by concealing relevant information or even fabricating evidence.¹²³ Or, more simply, the biased employee might put a certain “spin” on “decision-relevant events.”¹²⁴ In determining whether to impose liability in this context, courts commonly evaluate whether the official decisionmaker conducted an “independent investigation.” Essentially, courts look to see whether the final decision was “sufficiently insulated from” bias, or whether the “taint injected into the process was removed before the ultimate decision was made.”¹²⁵ It is this context—where the official decisionmaker does not simply rubber stamp but still considers the biased employee’s recommendation—that has divided the circuit courts.

II. CURRENT CIRCUIT SPLIT REGARDING THE LEVEL OF INFLUENCE NECESSARY TO ESTABLISH LIABILITY

The circuit courts currently disagree about how much influence the biased employee must exercise over the decision to hold the employer liable.¹²⁶ Although authorities agree about the circuit split’s existence, they disagree about where the circuits stand within this split.¹²⁷ The approaches contain slight nuances, which makes it difficult to place the courts into distinct categories.¹²⁸ Not only do

¹²² *Id.* at 514–15.

¹²³ *Id.* at 515.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Ratliff, *supra* note 22, at 260.

¹²⁷ Compare Fowler, *supra* note 14, at 45 (characterizing the *Russell* decision as a “middle of the road approach”), with Eber, *supra* note 13, at 155 (stating that the *Russell* opinion demonstrates the lenient standard).

¹²⁸ Ratliff, *supra* note 22, at 260 (noting that “the subtleties of the various circuits’ opinions on cat’s paw liability often make it difficult to definitively place them within one category or another”).

inter-circuit subtleties exist, but intra-circuit subtleties exist, too.¹²⁹ Adding further confusion, the circuit courts often use imprecise language within a single opinion.¹³⁰ Nonetheless, the Fifth Circuit's influence standard, the Fourth Circuit's actual decisionmaker standard and the Tenth Circuit's causation standard fairly represent the varying approaches, and each will be discussed in turn.

*A. Many of the Circuit Courts Have Adopted an
"Influence" or "Input" Standard*

Many of the circuits impose liability when the biased employee merely influences the ultimate decision.¹³¹ For example, the Fifth Circuit requires the plaintiff to prove that the biased employee "possesse[d] leverage, or exert[ed] influence, over the titular decisionmaker."¹³² In *Russell v. McKinney Hospital Venture*, the fifty-four year old plaintiff, Sandra Russell, argued that co-worker Steve Ciulla's age-based animus should be imputed to the formal decisionmaker.¹³³ Russell and Ciulla worked in equivalent positions at Homecare, and they reported to the same supervisor, Carol Jacobsen.¹³⁴ Ciulla allegedly made many remarks indicating age-based bias; in fact, Russell had to buy earplugs for the office because of how frequently Ciulla referred to her as an "old bitch."¹³⁵ Ciulla eventually

¹²⁹ See Thomas, *supra* note 33, at 654 (comparing one Fifth Circuit case requiring a causal nexus and another Fifth Circuit case focusing on mere influence).

¹³⁰ Petition for Writ of Certiorari at 16, *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 552 U.S. 825 (2007) (No. 06-1694) (stating that "the various circuit courts have used ambiguous and inconsistent language to describe the appropriate legal standard").

¹³¹ See *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 303 (4th Cir. 2004) (Michael, J., dissenting) (noting that "[m]ost other circuits, in either mixed-motive or pretext cases, have held that when the discriminatory bias of a subordinate influences an employment decision, the employer will be charged with the subordinate's bias").

¹³² *Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 227 (2000).

¹³³ *Id.* at 222, 227.

¹³⁴ *Id.*

¹³⁵ *Id.* at 226.

approached Jacobsen with an “ultimatum” that he would quit if Jacobsen did not terminate Russell.¹³⁶ In addition, Ciulla suggested to others that he was responsible for Russell’s termination.¹³⁷

The Fifth Circuit considered whether Ciulla’s animus could be attributed to Homecare even though Ciulla did not fire Russell. Instead of simply looking for bias in the official decisionmaker, the court assessed whether other employees involved in the decision possessed bias.¹³⁸ The court stated that it will impute an employee’s discriminatory intent if that employee influenced the official decisionmaker.¹³⁹ In essence, the court refuses to “blindly accept the titular decisionmaker as the true decisionmaker.”¹⁴⁰

Evaluating Russell’s evidence under this framework, the Fifth Circuit concluded that Ciulla “wielded sufficiently great ‘informal’ power within Homecare such that he effectively became the decisionmaker with respect to Russell’s termination.”¹⁴¹ Ciulla’s father was the chief executive officer of Homecare’s parent corporation, and Ciulla allegedly used this power to his advantage.¹⁴² When faced with Ciulla’s ultimatum, Jacobsen knew that Ciulla’s father controlled her budget and her job.¹⁴³ The court decided that Ciulla’s ultimatum and age-based remarks influenced Jacobsen’s decision to terminate Russell.¹⁴⁴

Interestingly, even though the Fifth Circuit focused on mere influence, the court used terms connoting a higher degree of control at times. That is, the Fifth Circuit concluded that a reasonable jury could have decided that Ciulla “contributed significantly” to the termination

¹³⁶ *Id.* at 224.

¹³⁷ *Id.* at 226.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 227–28.

¹⁴² *Id.* at 228.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

decision.¹⁴⁵ Then, relying on the language of *Reeves*, the court stated that Ciulla was “principally responsible” for Russell’s termination.¹⁴⁶ Regardless of these apparent discrepancies in terminology, however, courts and commentaries consider the Fifth Circuit’s *Russell* opinion as demonstrating the mere influence approach.¹⁴⁷

Other circuits have adopted similar tests but used varying formulations of the amount of influence required. For example, the Second Circuit has required that the immediate supervisor possess “enormous influence” over the decision.¹⁴⁸ Rather than focusing on the amount of influence, some courts emphasize the biased employee’s involvement in the decisionmaking process. For instance, the Sixth Circuit has imposed liability where the biased subordinate “played a significant role” in the ultimate decisionmaking process.¹⁴⁹ And some courts examine both the ability to influence and the participation in the decisionmaking process. Specifically, the Ninth Circuit imposes liability if the biased employee “influenced, affected, or was involved in the adverse employment decision.”¹⁵⁰

B. The Fourth Circuit’s “Actual Decisionmaker” Standard

The Fourth Circuit has adopted the strictest standard for establishing liability under the cat’s paw doctrine.¹⁵¹ In stark contrast to the influence standard, the Fourth Circuit’s approach requires that the biased employee “possessed such authority as to be viewed as the

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Eber, *supra* note 13, at 155–57 (describing the *Russell* decision as a model of the lenient standard).

¹⁴⁸ *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156, 162 (2d Cir. 2001).

¹⁴⁹ *Johnson v. Kroger Co.*, 319 F.3d 858, 868 (6th Cir. 2003).

¹⁵⁰ *Poland v. Chertoff*, 494 F.3d 1174, 1183 (9th Cir. 2007); see also *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 286 (3d Cir. 2001) (stating “[u]nder our case law, it is sufficient if those exhibiting discriminatory animus influenced or participated in the decision to terminate”).

¹⁵¹ See generally *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277 (4th Cir. 2004) (en banc).

one principally responsible for the decision or the actual decisionmaker.”¹⁵² The Fourth Circuit initially set forth this rule in *Hill v. Lockheed Martin Logistics Management, Inc.*, where fifty-seven year old Ethel Hill claimed that she was terminated because of her sex and age.¹⁵³ Two of the company’s supervisory managers fired Hill after she received three reprimands for violations of standard operating procedures.¹⁵⁴ The managers based their decision on company policy that provided that three reprimands warranted discharge.¹⁵⁵ Hill did not dispute the rules violations giving rise to her reprimands nor did she claim that the two supervisory managers responsible for her termination acted with discriminatory motives.¹⁵⁶ Instead, Hill centered her claims on the alleged animus of Fultz, who was the safety inspector that reported the violations leading to her second and third reprimands.¹⁵⁷ Hill asserted that Fultz reported Hill’s infractions because of his discriminatory bias against Hill.¹⁵⁸ According to Hill, Fultz exhibited his bias by calling Hill a “useless old lady” who needed to retire, a “troubled old lady” and a “damn woman” on multiple occasions.¹⁵⁹

Initially, the Fourth Circuit noted that agency principles guided its determination of who could be considered a decisionmaker.¹⁶⁰ The court commented that the other circuits that had already considered the cat’s paw doctrine did not give proper weight to the agency principles that are meant to limit its application.¹⁶¹ The court then turned its attention to the Supreme Court’s decision in *Reeves*, where the Court addressed an employer’s liability for the discriminatory motives of a

¹⁵² *Id.* at 291.

¹⁵³ *Id.* at 282.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 282–83.

¹⁵⁷ *Id.* at 283.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 287.

¹⁶¹ *Id.* at 289–90.

non-decisionmaker employee.¹⁶² The Fourth Circuit interpreted *Reeves* to stand for the proposition that the biased employee does not necessarily have to be the “formal decisionmaker” to hold the employer liable.¹⁶³ But liability will exist only if the biased employee was “principally responsible” for or the “actual decisionmaker” behind the employment action.¹⁶⁴ If not, the Fourth Circuit refuses to impose liability even when the biased employee exercised “substantial influence” over or played a “significant role” in the decision.¹⁶⁵

Hill, however, argued that *Reeves* did not define the outer contours of employer liability.¹⁶⁶ Hill suggested a “substantial influence” test, which would hold an employer liable when the biased employee substantially influences a decision taken by the formal decisionmaker.¹⁶⁷ The Fourth Circuit rejected both propositions.¹⁶⁸ The court reasoned that the antidiscrimination statutes and applicable Supreme Court precedent did not allow such a broad reach of employer liability.¹⁶⁹

In dissent, Judge Michael remarked that the majority’s strict standard “puts [the Fourth Circuit] at odds with virtually every other circuit” while simultaneously rendering Title VII and the ADEA

¹⁶² *Id.* at 288.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 288–89.

¹⁶⁵ *Id.* at 291.

¹⁶⁶ *Id.* at 289.

¹⁶⁷ *Id.* The EEOC also supported Hill’s proposed test. *Id.* The Fourth Circuit stated that the EEOC asked for an even broader holding under the substantially influence test. Specifically, the Fourth Circuit interpreted the EEOC’s argument as holding an employer liable “whenever the influence is sufficient to be considered a cause of the employment action, even if the formal decisionmaker did not simply rubber-stamp the biased subordinate’s recommendation.” *Id.* (emphasis in original). For arguments in further support of the substantially influence test, see Tim Davis, *Beyond the Cat’s Paw: An Argument for Adopting a “Substantially Influences” Standard for Title VII and ADEA Liability*, 6 PIERCE L. REV. 247 (2007).

¹⁶⁸ *Hill*, 354 F.3d at 289.

¹⁶⁹ *Id.*

“essentially toothless.”¹⁷⁰ Unlike the majority, Judge Michael would have adopted Hill’s proposed substantially influence test.¹⁷¹ Judge Michael argued that the majority erred by placing excessive emphasis on agency principles when it should have focused on causation.¹⁷² Causation, unlike agency, is firmly rooted in the statutory language of Title VII and the ADEA.¹⁷³ That is, the statutes’ impose liability on employers when the adverse employment action was taken “because of” a prohibited characteristic.¹⁷⁴ Judge Michael also criticized the majority’s analysis of and reliance on *Reeves*.¹⁷⁵ Judge Michael concluded that the majority’s actual decisionmaker rule unnecessarily removes Title VII and the ADEA’s protections from an entire class of discrimination cases.¹⁷⁶

C. The Tenth Circuit’s Causation Standard

Applying a more centrist approach, the Tenth Circuit imposes liability when the biased employee’s actions cause the adverse employment decision.¹⁷⁷ In *EEOC v. BCI Coca-Cola Bottling Company of Los Angeles*, the plaintiff, Stephen Peters, alleged that he was terminated because of his race.¹⁷⁸ Peters, an African-American, worked as a merchandiser at BCI’s Albuquerque, New Mexico facility where more than sixty percent of the employees were Hispanic.¹⁷⁹ Jeff Katt, an account manager, and Cesar Grado, a district sales manager,

¹⁷⁰ *Id.* at 299, 301 (Michael, J., dissenting).

¹⁷¹ *Id.* at 304.

¹⁷² *Id.* at 301.

¹⁷³ *Id.* at 302.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 302–04.

¹⁷⁶ *Id.* at 304.

¹⁷⁷ *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 487–88 (10th Cir. 2006).

¹⁷⁸ *Id.* at 478.

¹⁷⁹ *Id.*

supervised Peters.¹⁸⁰ Although Grado handled scheduling, merchandisers often called in sick to their own account managers, rather than to Grado.¹⁸¹ Grado also monitored and evaluated the employees under his supervision.¹⁸² Grado did not have the authority to make discipline or termination decisions, but he did have the discretion to notify the human resources department of any disciplinary information.¹⁸³ The human resources department was ultimately in charge of disciplinary action.¹⁸⁴

The incident giving rise to Peters' termination surrounded a busy weekend where Grado directed Katt to inform Peters that Peters had to work on Sunday, his day off.¹⁸⁵ Upon notification, Peters told Katt that he could not work because he had plans.¹⁸⁶ Grado asked the human resources department whether he could force Peters to work on his day off.¹⁸⁷ Pat Edgar, a human resources employee, replied that Grado should tell Peters that working on Sunday was a "direct order" and failure to comply would amount to insubordination, which constituted grounds for termination.¹⁸⁸ After Grado relayed this information to Peters, Peters again replied that he had plans and angrily told Grado that his plans were "none of [Grado's] business."¹⁸⁹ The conversation ended with Peters saying "[d]o what [you] got to do and I'll do what I got to do."¹⁹⁰ Peters, however, became sick that Saturday, forcing him to cancel his Sunday plans and seek urgent care health care.¹⁹¹ Peters called and informed Katt that he could not work that Sunday because

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 479.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 480.

of his illness.¹⁹² After Peters failed to work on Sunday, Edgar spoke with other human resources personnel, as well as Grado.¹⁹³ Edgar decided to terminate Peters.¹⁹⁴ Edgar claimed her primary reason for terminating Peters was his behavior toward Grado, not for failing to work.¹⁹⁵

Thereafter, Peters filed a charge with the Equal Employment Opportunity Commission (EEOC), and the EEOC filed suit on his behalf, alleging that his termination was due to racial discrimination.¹⁹⁶ The EEOC argued that even though Edgar was the sole decisionmaker and was unaware that Peters was black, “Grado harbored racial animus toward African American employees and . . . this bias [should be] imputed to BCI because of Grado’s substantial involvement in the termination process as Peters’ supervisor and Edgar’s sole source of information about the events on which BCI alleges the termination was primarily based.”¹⁹⁷ The EEOC presented affidavits from other BCI employees stating that Grado treated African-American employees worse than employees of other races.¹⁹⁸ Grado also allegedly made race-based remarks at the workplace.¹⁹⁹

Additionally, the EEOC compared Grado’s treatment of Peters to his treatment of a Hispanic employee in a similar situation.²⁰⁰ During a different busy weekend, Grado told Katt to direct Monica Lovato, a Hispanic merchandiser, to work her day off.²⁰¹ Lovato replied that she would be celebrating her birthday on those days but Katt insisted that she was required to work.²⁰² Lovato failed to show up to work, even

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 482.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

after being paged repeatedly.²⁰³ Yet Grado never inquired about Lovato's reasons for missing work, and instead, Grado stated "you can't make somebody work one of their days off."²⁰⁴ The human resources department never disciplined Lovato for this incident.²⁰⁵

On appeal, the Tenth Circuit addressed whether Grado's alleged racial bias could be imputed to BCI under the cat's paw theory of liability.²⁰⁶ The Tenth Circuit noted that the circuits disagreed about the level of control that a biased employee must exert over the decision to warrant liability.²⁰⁷ The court described a "lenient" approach that holds employers liable so long as the biased employee exercised any level of influence.²⁰⁸ The Tenth Circuit concluded that the lenient approach was inconsistent with agency principles, improperly eliminated the element of causation, and weakened the deterrent effect of cat's paw liability.²⁰⁹ Thus, the court decided that plaintiffs must prove more than mere influence over the decisionmaking process.²¹⁰

Turning to the opposite end of the spectrum, the Tenth Circuit also disagreed with the Fourth Circuit's strict standard because it misconstrued the Supreme Court's holding in *Reeves*.²¹¹ The court reasoned that the *Reeves* Court did not intend for the phrase "actual decisionmaker" to prescribe the outer contours of liability, but, rather, the Supreme Court used the phrase to describe the employee's evidence.²¹² In essence, the Tenth Circuit concluded that the Fourth

²⁰³ *Id.*

²⁰⁴ *Id.* at 482–83.

²⁰⁵ *Id.* at 483.

²⁰⁶ *Id.* at 484.

²⁰⁷ *Id.* at 486.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 486–87.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

Circuit took the cat's paw metaphor "too literally in deriving its total-control-over-the-decision standard."²¹³

The court held that plaintiffs must prove that "the biased subordinate's discriminatory reports, recommendation, or other actions caused the adverse employment action."²¹⁴ Not only does this rule comply with agency principles, the court reasoned, but courts require a comparable causation standard in analogous workplace discrimination claims.²¹⁵ Although the Tenth Circuit clearly adopted a causation-based approach, the court never explicitly defined "cause," nor did it state what type of causation was required. The court's omission raises serious doctrinal concerns because several different standards of causation exist.

However, the Tenth Circuit did specify that the official decisionmaker can break the causal connection by conducting an independent investigation into the allegations against the employee.²¹⁶ In fact, the court stated that simply asking the affected employees for their version of the events would constitute an independent investigation.²¹⁷ But in the case at bar, Edgar's cursory review of Peter's personnel file did not amount to an independent investigation.²¹⁸ The Tenth Circuit concluded that the EEOC presented sufficient evidence that Grado's biased account of his conversation with Peters caused Peter's termination.²¹⁹

²¹³ *Id.* at 488.

²¹⁴ *Id.*

²¹⁵ *Id.* at 487–88. Notably, the Tenth Circuit held that the cat's paw doctrine did not require an explicit recommendation from the biased subordinate to fire the plaintiff. *Id.* at 488.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 492.

²¹⁹ *Id.* at 491.

III. THE SEVENTH CIRCUIT: WHERE DOES IT STAND?

The Seventh Circuit has been pegged with the introduction of the cat's paw doctrine, and yet it has inconsistently applied the doctrine. The court has even admitted its ambiguous ways, stating "our approach to Title VII cases involving an employee's influence over a decision maker has not always been completely clear."²²⁰ The Seventh Circuit's first cat's paw case, *Shager*, characterized the subordinate's influence as "decisive" and evaluated the "causal link" between the subordinate's bias and Shager's discharge.²²¹ Since *Shager*, the Seventh Circuit has used various standards in cat's paw cases. At times the court has applied a more lenient standard, but recently the court has required a much higher level of control.²²² In fact, the Seventh Circuit stated in 2007 that "[o]ur opinions have sometimes suggested that not only significant influence, but any influence over an employment decision is sufficient to impose Title VII liability on an employer."²²³

For example, in *Dey v. Colt Construction and Development Company*, the Seventh Circuit held that plaintiffs can defeat summary judgment by showing that "an employee with discriminatory animus provided factual information or other input that *may have affected* the adverse employment action."²²⁴ The plaintiff, Dey, filed suit arguing that she was terminated in retaliation for her sexual harassment complaints against the company's vice president and general counsel,

²²⁰ *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 479 F.3d 908, 919 (7th Cir. 2007).

²²¹ 913 F.2d 398, 405 (7th Cir. 1990).

²²² *Compare Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446 (7th Cir. 1994), with *Brewer*, 479 F.3d 908.

²²³ *Brewer*, 479 F.3d at 919.

²²⁴ 28 F.3d 1446, 1459 (7th Cir. 1994); *see also* *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1400 (7th Cir. 1997) (the court stated that "the prejudices of an employee, normally a subordinate but here a coequal, are imputed to the employee who has formal authority over the plaintiff's job . . . where the subordinate, by concealing relevant information from the decisionmaking employee or feeding false information to him, is able to influence the decision"); *Hoffman v. MCA, Inc.*, 144 F.3d 1117, 1121–22 (7th Cir. 1998) ("tainted the decision maker's judgment").

Chernoff.²²⁵ However, the official decisionmaker, Isray, was unaware of Dey's complaints.²²⁶ Accordingly, the company claimed that no causal link existed between Dey's protected activity and her termination.²²⁷ On appeal, the Seventh Circuit recognized that the official decisionmaker was unaware of Dey's protected activity, but further observed that Chernoff participated in the meeting discussing Dey's termination.²²⁸ During the meeting, Isray had asked Chernoff about Dey's performance.²²⁹ Chernoff replied that her performance was unsatisfactory and that he believed she should be terminated.²³⁰ From this, the court concluded that, even if Isray was unaware of the complaints, "those complaints may have affected Chernoff's unflattering assessment of her job performance" and "Chernoff's participation may have introduced a discriminatory animus into Isray's decision."²³¹

In *Lust v. Sealy, Inc.*, the Seventh Circuit explicitly renounced the Fourth Circuit's actual decisionmaker standard and stated that the strict rule was not in line with the Seventh Circuit's view.²³² The Seventh Circuit explained that courts should not interpret the cat's paw formula too literally.²³³ In fact, if the cat's paw analogy was "taken even semi-literally it would be inconsistent with the normal analysis of causal issues in tort litigation."²³⁴

Yet in 2007, just a few years later, the Seventh Circuit arguably aligned itself with the Fourth Circuit's stringent standard. The Seventh Circuit held that liability should exist only when the biased employee

²²⁵ *Dey*, 28 F.3d at 1450.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 1459.

²³⁰ *Id.*

²³¹ *Id.* at 1459–1460.

²³² 383 F.3d 580, 584 (7th Cir. 2004).

²³³ *Id.*

²³⁴ *Id.*

exercises “singular influence” over the official decisionmaker.²³⁵ In *Brewer*, Lonnell Brewer, an African-American, brought a Title VII action against the University of Illinois alleging that he was terminated from his job and dismissed from his master’s program because of his race.²³⁶ Brewer invoked the cat’s paw theory to impute the discriminatory bias of his supervisor, Kerrin Thompson, to the University.²³⁷

The events leading to Brewer’s termination involved a scandal regarding his parking pass.²³⁸ When Brewer began his assistantship, Thompson told him that he could park anywhere.²³⁹ After receiving a ticket for a broken pass, Brewer went to the university’s parking services to get a replacement parking sticker.²⁴⁰ Parking services noticed that Brewer’s parking application contained inaccurate information.²⁴¹ Brewer went to speak with Thompson about the issue, and Thompson became “irate,” telling Brewer he should have never gone to the parking services office because Thompson had lied in the application to be able to get Brewer the parking tag.²⁴² After Brewer reminded Thompson that she told him he could park anywhere, she furiously stated that she was “through with you people.”²⁴³ And as Brewer left her office, Thompson yelled out “I have had it with you nigger, get my tag!”²⁴⁴ The program director, Denise Hendricks, terminated Brewer because of the parking incident.²⁴⁵ Brewer argued

²³⁵ See *Brewer*, 479 F.3d at 917–18.

²³⁶ *Id.* at 909.

²³⁷ *Id.* at 916–17.

²³⁸ *Id.* at 909. Judge Cudahy interestingly introduced the case by stating that it “concerns the corrupt, Machiavellian world of permit parking at the University of Illinois’s Urbana-Champaign campus, and the ill fortune of a student who became involved in it.” *Id.*

²³⁹ *Id.* at 910.

²⁴⁰ *Id.* at 913.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

that racial bias motivated Thompson's failure to tell Hendricks that she had given Brewer permission to park anywhere, and Brewer contended that this omission caused his termination.²⁴⁶

On appeal, the Seventh Circuit analyzed whether the University could be liable for Thompson's racially motivated omission.²⁴⁷ The court stated that what other employees say to each other typically does not constitute an adverse employment action.²⁴⁸ However, in certain contexts, such as a performance review, what one employee says or does not say about another can control an employee's wages, affect chances of promotion or even trigger termination.²⁴⁹ The court decided that Thompson's withholding of information influenced Hendricks's decision to fire Brewer.²⁵⁰

But an employee's minimal amount of influence does not warrant liability; rather, the biased employee must exercise singular influence.²⁵¹ The Seventh Circuit explained that the biased employee must "possess so much influence as to basically be herself the true 'functional[] . . . decision-maker.'"²⁵² Focusing on the analogy underlying the doctrine, the court stated that the functional decisionmaker must be nothing more than the biased employee's cat's paw.²⁵³ The court described such a situation as one where the functional decisionmaker entirely depends on another employee to "supply the information on which to base that decision."²⁵⁴ Liability will not exist as long as the decisionmaker does not rely solely on the biased employee's information, even if she heavily relies on it.²⁵⁵

²⁴⁶ *Id.* at 916.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 917.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* (quoting *Little v. Ill. Dept. of Revenue*, 369 F.3d 1007, 1015 (7th Cir. 2004)).

²⁵³ *Id.* at 917–18.

²⁵⁴ *Id.* at 918.

²⁵⁵ *Id.* at 919.

Similarly, the court held that an employer can prevent liability by conducting an investigation into the facts relevant to the decision.²⁵⁶ The Seventh Circuit concluded that Hendricks looked into the situation herself and did not entirely rely on the information that Thompson told her.²⁵⁷ Notably, the court stated that when faced with two conflicting stories, an employer satisfies the independent investigation defense by simply considering both stories.²⁵⁸ The court also suggested Brewer had a duty to tell Hendricks that Thompson was withholding information to trigger further investigation.²⁵⁹

The Seventh Circuit then turned to address the conflict between the singular influence approach and its prior precedent.²⁶⁰ To the extent that previous cases had suggested that any influence establishes liability, the court stated those cases were doubtful dicta and simply involved “imprecise language.”²⁶¹ Further, the court compared those cases with numerous others where the court upheld summary judgment when a biased employee may have exercised potential, but slight, influence over the decision.²⁶²

Most recently, the Seventh Circuit reaffirmed its singular influence standard in an employment discrimination case arising under the Uniformed Services Employment and Reemployment Rights Act.²⁶³ In *Staub v. Proctor Hospital*, the plaintiff, Vincent Staub, alleged that he was terminated because of his military association and the reasons given for his termination—insubordination, shirking, and attitude problems—were merely pretext.²⁶⁴ As an Army reservist, Staub had military obligations one weekend per month and two weeks

²⁵⁶ *Id.* at 918.

²⁵⁷ *Id.* at 919.

²⁵⁸ *Id.* at 918.

²⁵⁹ *Id.* at 919.

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 919–20.

²⁶³ *Staub v. Proctor Hosp.*, 560 F.3d 647, 650–51 (7th Cir. 2009); 38 U.S.C. §§ 4301–4333 (2006).

²⁶⁴ *Staub*, 560 F.3d at 650–51.

in the summer.²⁶⁵ Janice Mulally, Staub's supervisor in charge of scheduling, often ignored Staub's requests for time off, calling his military duties "bullshit."²⁶⁶ On one occasion, Mulally issued Staub a written warning for allegedly disobeying instructions.²⁶⁷ A few months later, a coworker complained that Staub was often unavailable.²⁶⁸ Later, Staub's supervisor was unable to locate him, in violation of Mulally's instruction to notify her of his location.²⁶⁹ After this episode, Linda Buck, the vice president of human resources, terminated Staub.²⁷⁰ Buck stated that without the three prior incidents—Mulally's warning, the coworker's complaint and Staub's "disappearance"—she would not have fired Staub.²⁷¹

Staub invoked the cat's paw theory to impute Mulally's animus to Buck.²⁷² Staub contended that Mulally fed false information to Buck because of her discriminatory bias and that Buck relied on this information in deciding to terminate Staub.²⁷³ Staub convinced a jury of this theory and obtained a verdict in his favor.²⁷⁴ On appeal, however, the Seventh Circuit reversed the jury verdict because of insufficient evidence.²⁷⁵ The court applied the same rule as it did in *Brewer*, namely, whether the biased employee exercised singular influence over the official decisionmaker.²⁷⁶ Unless the ultimate decisionmaker held that title only nominally, liability will not exist.²⁷⁷ Again, drawing from the underlying analogy, the Seventh Circuit

²⁶⁵ *Id.* at 651.

²⁶⁶ *Id.* at 651–52.

²⁶⁷ *Id.* at 653.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 654.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 655.

²⁷³ *Id.* at 655.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 657.

²⁷⁶ *Id.* at 656.

²⁷⁷ *Id.*

stated “true to the fable, [a cat’s paw case] requires a blind reliance, the stuff of ‘singular influence.’”²⁷⁸ Thus, the Seventh Circuit’s precedent demonstrates how courts have struggled with the proper application of the cat’s paw doctrine over the past twenty years.

IV. THE APPROPRIATE REACH OF CAT’S PAW LIABILITY

The circuits’ varying standards apparently results from just how literally courts interpret the cat’s paw analogy. On the one hand, courts applying the influence standard hardly focus on the analogy, using it as a guidepost at most. On the other hand, the Fourth Circuit has taken the metaphor quite literally in “deriving its total-control-over-the-actual-decision standard.”²⁷⁹ The Tenth Circuit expressly disagrees with an approach that limits liability to cases closely resembling the cat’s paw.²⁸⁰ Rather, the Tenth Circuit described its view of the analogy by stating, “[s]tripped of their metaphors, subordinate bias claims simply recognize that many companies separate the decisionmaking function from the investigation and reporting functions, and that racial bias can taint any of those functions.”²⁸¹ And in *Staub*, the Seventh Circuit limited liability to cases that are “true to the fable.”²⁸²

Ultimately, a comparison of each circuit’s unique approach is more than a semantic exercise.²⁸³ The particular standard can affect the outcome of the case, whether it is resolved at the summary judgment level or proceeds to trial.²⁸⁴ Thus, without a uniform standard, “similarly situated parties receive different treatment

²⁷⁸ *Id.* at 659 (quoting *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 479 F.3d 908, 917 (7th Cir. 2007)).

²⁷⁹ *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476, 488 (10th Cir. 2006).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009).

²⁸³ Thomas, *supra* note 33, at 655.

²⁸⁴ *Id.*

depending on where they bring their cases.”²⁸⁵ Courts need to adopt a coherent and uniform standard for deciding these common cases. In doing so, this section offers three suggestions. First, courts should use a motivating factor standard of causation in determining liability rather than focusing on vague formulations of influence. Second, courts need to scrutinize whether an independent investigation truly breaks the causal connection. Third, courts should apply agency principles to limit the imposition of vicarious liability in this context.

A. Courts Should Adopt the Standard of Motivating Factor Causation to Determine the Requisite Level of Control that a Biased Employee Must Exercise in Order to Impose Liability

The element of causation constitutes one of the central issues in delineating the appropriate reach of cat’s paw liability.²⁸⁶ As in any other disparate treatment claim, the plaintiff in a cat’s paw case must demonstrate a causal connection between the prohibited characteristic and the challenged action.²⁸⁷ Although the current circuit split focuses on the requisite degree of influence that the biased employee must exercise, the courts’ various formulations, as a practical matter, relate to the standard of causation that the courts are seeking to impose.²⁸⁸ Specifically, the lenient influence approach requires only a minimal level of causation, while the strict actual decisionmaker and singular influence standards require a much higher level of causation. Even the courts that claim to use a causation-based approach do not define causation nor indicate what causation standard they require. However, the lack of a unified causation standard in cat’s paw cases should come as no surprise because, as discussed in Section I.A, employment discrimination law, on the whole, suffers from the same deficiency.²⁸⁹

²⁸⁵ Eber, *supra* note 13, at 187.

²⁸⁶ White & Krieger, *supra* note 7, at 511.

²⁸⁷ *Id.*

²⁸⁸ Thomas, *supra* note 33, at 659.

²⁸⁹ Katz I, *supra* note 36, at 491–93. Attempting to make sense of the causation doctrine, Professor Katz has categorized the six most prominent formulations as

To resolve the ambiguity, courts should adopt the motivating factor causation standard to determine when employers should be held liable for several reasons. First, the statutory language of Title VII explicitly calls for a motivating factor test.²⁹⁰ Congress amended Title VII so that instead of requiring that the adverse employment action was taken “because of” a prohibited characteristic, now the prohibited characteristic need only be a “motivating factor.”²⁹¹ Prior to the 1991 amendment, the “because of” language had been interpreted to require but-for causation.²⁹² The tort concept of but-for causation means that a factor is considered necessary to an event if, but for its existence, the event would not have taken place when it did.²⁹³ The Supreme Court’s opinion in *Price Waterhouse*, which triggered the 1991 Amendments, discussed the problems with requiring plaintiffs to prove but-for causation, especially in disparate treatment cases.²⁹⁴ As a result, scholars agree that the change to the motivating factor test demonstrates Congress’ intent to remove the standard of but-for causation.²⁹⁵ Therefore, the strict principally responsible and singular influence standards of causation contradict the statutory language of Title VII and correspondingly Congress’ intent. By requiring that the

follows: (1) the “motivating factor” test from the 1991 Act and *Price Waterhouse*; (2) the “same action” formulation also from the 1991 Act; (3) the “but for” test; (4) the “determinative influence” or “determinative factor” formulation; (5) the “a role,” “a cause,” and “a factor” test; and (6) the “substantial factor” test. *Id.* at 500–01.

²⁹⁰ See Befort & Olig, *supra* note 8, at 402.

²⁹¹ 42 U.S.C. § 2000e-2(m); Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims* and *Gross v. FBL Financial Services, Inc.*, 78 *FORDHAM L. REV.* 399, 417–18 (2009).

²⁹² See White & Krieger, *supra* note 7, at 505.

²⁹³ Katz I, *supra* note 36, at 496, 501.

²⁹⁴ Martin J. Katz, *Unifying Disparate Treatment (Really)*, 59 *HASTINGS L.J.* 643, 655–58 (2008) [hereinafter Katz II] (discussing how plaintiffs have problems getting access to the evidence that is necessary to prove but for causation because it is under the control of the defendant, that is, it is “often in the head of the decision-maker”).

²⁹⁵ Katz I, *supra* note 36, at 505–06.

biased subordinate serve as the “actual decisionmaker,” the strict causation standards requires, at a minimum, but-for causation.²⁹⁶

In place of but-for causation, Title VII now requires that the prohibited characteristic be a “motivating factor” in the decision.²⁹⁷ Congress definitely enacted the motivating factor test to require a less onerous causation standard than but-for causation.²⁹⁸ Although the motivating factor language does not constitute a traditional causation concept, legislative history suggests that it most likely refers to the tort standard of minimal causation.²⁹⁹ Minimal causation exists when a factor does not rise to the level of necessity, but does have some causal influence on the event in question.³⁰⁰

However, in light of the Supreme Court’s recent decision in *Gross v. FBL Financial Services, Inc.*, the motivating factor standard apparently only applies in Title VII cat’s paw cases.³⁰¹ Yet strong arguments exist that the same standard should be used in relation to all of the antidiscrimination statutes that use the “because of” language.³⁰² As Justice Stevens noted in his *Gross* dissent, *Price Waterhouse* interpreted the “because of” language as requiring the motivating factor test and not but-for causation.³⁰³ Additionally, the Supreme Court has historically applied Title VII precedent to ADEA

²⁹⁶ Befort & Olig, *supra* note 8, at 402.

²⁹⁷ 42 U.S.C. § 2000e-2(m).

²⁹⁸ See *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343, 2357 (2009) (Stevens, J., dissenting) (stating that *Price Waterhouse* repudiated the but-for standard twenty years ago and Congress’ response also demonstrates that but-for causation is not necessary); Befort & Olig, *supra* note 8, at 402–03.

²⁹⁹ Katz I, *supra* note 36, at 505–06.

³⁰⁰ *Id.* at 498–99.

³⁰¹ 129 S. Ct. 2343 (2009).

³⁰² See Katz II, *supra* note 294, at 667–73 (outlining numerous reasons why the motivating factor interpretation of “because of” should be applied to antidiscrimination statutes other than Title VII, such as an assumption of uniformity, the uniform-meaning canon of statutory construction, express statement of congressional intent and the historical context of the 1991 Amendment).

³⁰³ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (stating, “[t]o construe the words ‘because of’ as colloquial shorthand for ‘but-for’ causation is to misunderstand them”).

cases.³⁰⁴ And with respect to cat's paw cases specifically, courts have consistently assumed that the same legal standard applies to all of the antidiscrimination statutes.³⁰⁵ Unfortunately, the current fragmented treatment of antidiscrimination statutes creates additional problems in attempting to create a unified standard for the cat's paw doctrine. Nonetheless, the best solution should still focus on causation.

In addition to statutory language, antidiscrimination legislation's underlying goals support motivating factor causation. Congress enacted antidiscrimination statutes to deter discrimination and to provide remedies to discrimination victims.³⁰⁶ The stringent actual decisionmaker and singular influence standards counter the statutes' deterrent purpose. Knowing they can escape liability so long as the biased employee did not completely control the decision, employers have little incentive to proactively eliminate discrimination in their workplaces.³⁰⁷ In fact, the strict rules may encourage employers to design policies of "willful blindness" where the decisionmaking process "intentionally mask[s] the underlying discriminatory motive as a basis to avoid liability."³⁰⁸ At the same time, overly lenient standards may not further the deterrent goal either. If employers can be liable based on an insignificant amount of biased influence, they may believe that preventative measures are simply fruitless.³⁰⁹ A causation-based standard forges a middle ground that encourages employers to implement policies that prevent, not cover up, discrimination.

³⁰⁴ *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *see also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (applying Title VII principles to ADEA case).

³⁰⁵ Petition for Writ of Certiorari at 24, *Staub v. Proctor Hosp.*, 560 F.3d 647 (7th Cir. 2009) (No. 09-400), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/11/09-400_pet1.pdf.

³⁰⁶ Befort & Olig, *supra* note 8, at 403.

³⁰⁷ Keaton Wong, Comment, *Weighing Influence: Employment Discrimination and the Theory of Subordinate Bias Liability*, 57 AM. U. L. REV. 1729, 1753–54 (2008).

³⁰⁸ Befort & Olig, *supra* note 8, at 404.

³⁰⁹ Eber, *supra* note 13, at 177–78.

A causation-based approach also advances the remedial purpose of antidiscrimination. A less onerous standard, like motivating factor causation, makes it easier for plaintiffs to defeat summary judgment and allow a jury to decide whether the discriminatory conduct caused the employment decision.³¹⁰ Permitting greater access to a jury is important because federal antidiscrimination statutes are remedial in nature and, as such, should be broadly construed to fulfill their purposes.³¹¹ Strict standards of causation, like those of the Fourth and Seventh Circuit, ignore the remedial purpose of antidiscrimination statutes by imposing such a high hurdle.³¹² The actual decisionmaker and singular influence rules effectively remove an entire category of plaintiffs from the protections of antidiscrimination legislation.³¹³

Moreover, a causation-based standard properly maintains the element of causation. Despite the ambiguities about the standard of causation, there is no doubt that the antidiscrimination statutes require a causal connection between the unlawful bias and the challenged decision.³¹⁴ The lenient approach may inappropriately remove the causation requirement.³¹⁵ Courts may impose liability based on a trivial amount of influence or involvement and presume that causation exists. Thus, the lenient standard's failure to address the element of causation constitutes a significant flaw. A motivating factor standard, however, does not eliminate a requirement of causation. Minimal causation still requires that the discriminatory intent have a causal influence on the adverse employment action, but it does not require that the intent rise to the level of "but for" causation.

³¹⁰ *Id.* at 175.

³¹¹ Befort & Olig, *supra* note 8, at 403.

³¹² *Id.*

³¹³ Kaler, *supra* note 2, at 1087.

³¹⁴ White & Krieger, *supra* note 7, at 503–05.

³¹⁵ EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 486–87 (10th Cir. 2006) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745 (1998) as construing Title VII “to accommodate the agency principle of vicarious liability for harm *caused* by misuse of supervisory authority” (emphasis in original)).

Finally, courts can uniformly understand and apply traditional tort principles of causation.³¹⁶ Courts have struggled in applying the vague standards enunciated by many of the circuit courts. The blurred boundaries between whether a biased employee was the “actual decisionmaker,” the one “principally responsible,” exercised “singular influence,” or “provided input” causes illogical results.³¹⁷ Instead of assessing ambiguous terminology, courts should explicitly evaluate the element of causation. Tort causation principles are “well-defined and widely understood by courts.”³¹⁸ Thus, in contrast to the influence and actual decisionmaker approaches, the causation-based standard certainly focuses on the appropriate issue. But because several different causation standards exist in employment discrimination law, courts need to clarify what standard of causation they require. In doing so, courts should adopt the motivating factor standard because it comes straight from the language of Title VII, maintains an element of causation and provides a uniform formulation that courts can readily apply. In sum, motivating factor causation offers the best solution to the circuit split over the level of control that the biased employee must exercise over the actual decisionmaker.

B. “Independent” Investigations: When Should They Be Permitted to Break the Causal Connection?

Closely related to the standard of causation, the independent investigation defense constitutes another important issue in the cat’s paw context. An independent investigation “serves to replace the influence of a subordinate’s bias with the untainted determination of an unbiased ultimate decisionmaker.”³¹⁹ By investigating the circumstances relevant to the decision, the official decisionmaker can remove the taint of discrimination brought in by the biased employee’s

³¹⁶ Eber, *supra* note 13, at 184.

³¹⁷ *See id.*

³¹⁸ *Id.*

³¹⁹ Befort & Olig, *supra* note 8, at 413–14.

actions and thereby break the chain of causation.³²⁰ Nearly all of the circuit courts allow an employer to escape liability by conducting an independent investigation.³²¹ Yet despite this general agreement, the circuits are again divided about the meaning of “independent investigation.”³²²

More precisely, the courts disagree about the type of investigation that employers must conduct to remove the taint of discrimination.³²³ For example, the Tenth Circuit in *BCI* stated that merely asking the affected employee for his side of the story suffices.³²⁴ The Seventh Circuit in *Brewer* stated that “[i]t does not matter that, in a particular situation, much of the information has come from a potentially biased source, so long as the decision maker does not . . . limit her investigation to information from the biased source.”³²⁵ The Seventh Circuit also suggested that the affected employee had a duty to inform the official decisionmaker of any additional facts that would warrant further investigation.³²⁶ In contrast, the Fifth Circuit has held that an

³²⁰ *Id.* at 412.

³²¹ *See, e.g.,* Poland v. Chertoff, 494 F.3d 1174, 1183 (9th Cir. 2007); EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 486 (10th Cir. 2006); Cariglia v. Hertz Equip. Rental Corp., 363 F.3d 77, 87 n.4 (1st Cir. 2004); Willis v. Marion County Auditor’s Office, 118 F.3d 542, 547 (7th Cir. 1997); Long v. Eastfield Coll., 88 F.3d 300, 307 (5th Cir. 1996).

³²² Ratliff, *supra* note 22, at 269.

³²³ *Id.*

³²⁴ *BCI Coca-Cola*, 450 F.3d at 488. The First and Eleventh Circuits have adopted a similar view. Cariglia v. Hertz Equipment Rental Corp., 363 F.3d 77, 87 n.4 (1st Cir. 2004) (stating that its decision to remand the case for additional findings may have been different if the plaintiff had been given an opportunity to address the allegations against him); Llampallas v. Mini-Circuits, Lab, Inc., 163 F.3d 1236, 1250 (11th Cir. 1998) (holding that an employer should be absolved from liability when “the employer makes an effort to determine the employee’s side of the story”).

³²⁵ 479 F.3d at 918.

³²⁶ 479 F.3d 919; *see also* Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 293–94 (4th Cir. 2004) (en banc) (noting that the employee failed to dispute any of her biased supervisor’s negative evaluations and that “it was incumbent upon her to dispute any basis for the reprimand at that time if she intended to complain later”); *but see* Madden v. Chattanooga City Wide Serv. Dept.,

investigation does not necessarily sever the causal link between the alleged bias and the decision.³²⁷ Instead, the Fifth Circuit allows the jury to determine whether the ultimate decision was based on the employer's independent investigation.³²⁸ As an example of a clearly sufficient effort, the investigation in *Stimpson v. City of Tuscaloosa* consisted of a three-day hearing where the employee was permitted to present evidence and witnesses on his behalf.³²⁹ Courts have given less attention to steps that do not constitute an independent investigation. But the Tenth Circuit did find a basic review of the affected employee's personnel file unsatisfactory.³³⁰

The uncertainty relating to independent investigations burdens all types of employers.³³¹ Employers increasingly vest decisionmaking authority in lower-level employees and allow those employees to base their decisions on information provided by subordinates.³³² With the varying standards for cat's paw liability, employers are unsure how to tailor their decisionmaking structure so as to avoid liability.³³³ In particular, large employers with centralized personnel departments need help designing procedures that expose potential bias.³³⁴ And smaller employers with fewer resources also need to know "how much time and money must be put into an investigation."³³⁵

549 F.3d 666 (6th Cir. 2008) (finding employer liable even though the employee failed to raise his supervisor's racial bias during an investigation conducted by a subordinate manager).

³²⁷ *Gee v. Principi*, 289 F.3d 342, 346–47 (5th Cir. 2002).

³²⁸ *Long v. Eastfield Coll.*, 88 F.3d 300, 307 (5th Cir. 1996); *see also* *Kramer v. Logan Sch. Dist. No. R-1*, 157 F.3d 620, 622–24 (8th Cir. 1998) (holding that the issue of whether the school board rubber stamped a recommendation for non-renewal was "appropriately presented to the jury").

³²⁹ *Stimpson v. City of Tuscaloosa*, 186 F.3d 1328, 1332 (11th Cir. 1999).

³³⁰ 450 F.3d, 476, 492–93 (10th Cir. 2006).

³³¹ *Santoro*, *supra* note 37, at 835.

³³² *Eber*, *supra* note 13, at 188.

³³³ *Id.*

³³⁴ *Santoro*, *supra* note 37, at 835.

³³⁵ *Id.*

Although the independent investigation doctrine may be theoretically sound, several problems exist with the defense in its current state. First, many circuits allow too low of a level of investigation to break the causal connection. By characterizing the mere act of asking employees for their version of the events as an independent investigation, courts too quickly assume that this action will remove the discriminatory taint. The Seventh Circuit in *Brewer* stated that an independent investigation contains “some affirmative act by the decision maker to come to his own decision.”³³⁶ Yet the court held that the decisionmaker’s simple action of looking at the altered parking sticker, which served as the impetus for the employee’s termination, constituted such an affirmative action.³³⁷

Courts should be wary in concluding that such cursory actions constitute an independent investigation. Because the defense fundamentally relates to causation, it is vital that courts examine whether the investigation truly breaks the connection between the employee’s bias and the ultimate decision.³³⁸ Thus, courts should not blindly consider any perfunctory employer action an independent investigation, but, instead, should more carefully scrutinize the employer’s steps. In its merits brief to the Supreme Court, the EEOC suggested that the “more thorough, balanced, and truly independent the investigation, the more likely the termination will be the result of the investigation rather than the discriminatory input.”³³⁹

In addition to the low threshold of what satisfies the defense, another problem relates to whether an investigation can ever truly be independent in the cat’s paw context. The circuit courts have assumed that an impartial inquiry is possible and have ignored the role of expectancy confirmation bias.³⁴⁰ Expectancy confirmation bias, a

³³⁶ *Brewer v. Bd. of Tr. of the Univ. of Ill.*, 479 F.3d 908, 919 (7th Cir. 2007).

³³⁷ *Id.*

³³⁸ Eber, *supra* note 13, at 194–95.

³³⁹ Brief of Respondent at 35, *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006) (No. 06–341), *cert. dismissed*, 549 U.S. 1334 (2007).

³⁴⁰ Recent Cases, *Employment Law -- Title VII -- Tenth Circuit Clarifies Causation Standard for Subordinate Bias Claims*, 120 HARV. L. REV. 1699, 1703 (2007).

social psychology concept, teaches that after a recommendation has been made, the recommendation will serve as a prior theory or a tentative hypothesis.³⁴¹ More specifically, a biased employee's recommendation "can reasonably be expected to influence the ultimate decision maker's judgment in a recommendation-consistent direction, even if he conducts his own investigation."³⁴²

Expectancies also affect the amount and type of information that individuals seek before making a final decision.³⁴³ Because the decisionmaker may be anchored to a presumption of guilt, the decisionmaker may investigate the underlying events in a way that uncovers only expectation-confirming evidence.³⁴⁴ Further, decisionmakers may ask asymmetric questions that allow confirmation of their hypotheses.³⁴⁵ Not only does expectancy confirmation bias influence the investigation, but it also affects how individuals process information once uncovered. The decisionmaker will likely consider theory-confirming evidence more probative than any theory-disconfirming evidence.³⁴⁶ Social science research demonstrates that the decisionmaker may "remember the strengths of confirming evidence but the weaknesses of disconfirming evidence . . . [and] accept confirming evidence at face value while scrutinizing disconfirming evidence hypercritically."³⁴⁷ Individuals also process expectancy-confirming information more easily.³⁴⁸

³⁴¹ White & Krieger, *supra* note 7, at 524. For a detailed description of the classic studies illustrating the expectancy confirmation bias, see *id.* at 525.

³⁴² *Id.* at 524.

³⁴³ Recent Cases, *supra* note 340, at 1704.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ White & Krieger, *supra* note 7, at 525–26.

³⁴⁷ Recent Cases, *supra* note 340, at 1704–05 (quoting Charles G. Lord et. al., *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098, 2099 (1979) (determining "that individuals with strong preconceived opinions examine evidence in a biased manner")).

³⁴⁸ *Id.* at 1704.

Indeed, the effects of expectancy confirmation bias are strongest in a situation like a cat's paw case.³⁴⁹ The decisionmaker may give "excessive deference" to the biased subordinate's story and less credit to the employee's account because of the supervisor's higher position in the workplace hierarchy.³⁵⁰ Further, individuals holding positions of power are more likely to be affected by expectancy confirmation bias.³⁵¹ Because of high demands on their cognitive resources and the lack of any direct negative consequences, superiors are prone to use the hypothesis as a "convenient heuristic" and to conduct investigations in an expectancy-confirming way.³⁵² Research also demonstrates that expectancy confirmation bias tends to materialize more often in situations dealing with ambiguous or complex evidence, which is common in employment decisions.³⁵³

Consequently, the notion that an investigation can always remove the taint of bias is inherently flawed. The independent investigation defense, as it currently stands, does nothing to account for this possibility.³⁵⁴ To counteract the effects of expectancy confirmation bias, the decisionmaker should inquire into the relevant supervisor's background and motives whenever an employment action is taken against a member of a protected class.³⁵⁵ For example, the ultimate decisionmaker could interview the supervisor's colleagues and examine the supervisor's file for potential complaints of biased behavior.³⁵⁶ The decisionmaker could study the supervisor's reports

³⁴⁹ White & Krieger, *supra* note 7, at 526.

³⁵⁰ Recent Cases, *supra* note 340, at 1703–04.

³⁵¹ *Id.* at 1705.

³⁵² *Id.*

³⁵³ *Id.* Research also suggests that the effects of expectancy confirmation bias will be magnified where "the deficiencies or transgressions grounding the supervisor's report or recommendation are consistent with a stereotype associated with the target employee's social group." White & Krieger, *supra* note 7, at 524–25.

³⁵⁴ For an argument that the independent investigation issue should be considered a question of fact and judges should not be permitted to grant summary judgment based on the defense, see Ratliff, *supra* note 22, at 274–77.

³⁵⁵ Recent Cases, *supra* note 340, at 1706.

³⁵⁶ *Id.*

and recommendations regarding other employees to check for any pattern of bias.³⁵⁷ Professors White and Krieger suggest that

[s]uch an affirmative process would require, among other things, explicitly considering the possibility that bias had influenced the process at its earlier stages, assuring that all available allegation or recommendation-inconsistent facts have been energetically developed and their potential implications thoroughly explored, and subjecting all recommendation-consistent information to rigorous critical scrutiny.³⁵⁸

If necessary, an employer could hire an independent outside consultant to conduct the investigation, although this option might be costly.³⁵⁹ Ultimately, the decisionmaker should “explicitly consider[] the possibility that bias had influenced the process at its earlier stages” to eliminate any discriminatory effects.³⁶⁰

However, a rigid rule detailing mandatory steps would ignore the fact-intensive nature of cat’s paw claims.³⁶¹ An independent investigation standard also must recognize that employers need to be able to rely on information from subordinate employees.³⁶² Employers should be able to maintain flexibility in conducting these inquiries,

³⁵⁷ *Id.*

³⁵⁸ White & Krieger, *supra* note 7, at 527.

³⁵⁹ Santoro, *supra* note 37, at 840. An outside consultant provides the benefit of being more experienced in conducting these types of employment investigations, interviewing employees and reviewing evidence. Additionally, an outside consultant may be more likely than an inside party to assess the situation from an impartial perspective. On the other hand, an outside consultant may be less familiar with the particular workplace’s culture, organizational structure and the parties involved in the employment decision. *Id.*

³⁶⁰ White & Krieger, *supra* note 7, at 527.

³⁶¹ Eber, *supra* note 13, at 194.

³⁶² *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009) (explaining that any independent investigation standard must account for the realities of the workplace).

especially in light of the potential time and costs.³⁶³ A more thorough investigation does not need to be an onerous or lengthy task.³⁶⁴ Certainly not every situation would call for a three-day evidentiary hearing, as was conducted in *Stimpson*.³⁶⁵ In sum, courts should permit employers to prevent liability by conducting independent investigations. But courts must hold employers to a more meaningful standard in assessing whether the investigation sufficiently broke the causal link.³⁶⁶

C. Proper Consideration of Agency Principles Serves to Limit Employer Liability Under the Cat's Paw Doctrine

Even after establishing a causal link between a prohibited characteristic and the challenged decision, the plaintiff must still demonstrate that the disparate treatment can be attributed to the employer.³⁶⁷ Such an inquiry relates to the underlying agency principles that simultaneously give rise to cat's paw liability and serve to limit its application. A proper application of vicarious liability "eases concerns that causation analysis imposes liability for discrimination on a too attenuated basis."³⁶⁸ As discussed in Section I.A, Congress' use of the term agent in defining employer "evinced an intent to place some limits on the acts of employees for which employers . . . are to be held responsible."³⁶⁹ The question becomes, therefore, which employees can cause liability under the cat's paw doctrine.³⁷⁰

³⁶³ Recent Cases, *supra* note 340, at 1706.

³⁶⁴ *Id.*

³⁶⁵ 186 F.3d 1328, 1332 (11th Cir. 1999).

³⁶⁶ Eber, *supra* note 13, at 195.

³⁶⁷ White & Krieger, *supra* note 7, at 517.

³⁶⁸ *Id.* at 522.

³⁶⁹ Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

³⁷⁰ Ernest F. Lidge, III, *The Male Employee Disciplined for Sexual Harassment as Sex Discrimination Plaintiff*, 30 U. MEM. L. REV. 717, 747 (2000).

As can be assumed by this point, the circuit courts have given the agency issue varying degrees of attention. Many of the courts utilizing the lenient standard essentially ignore the issue of agency. One commentator noted that because those courts failed to overtly discuss the agency issue, “it is not clear whether these courts view the agency link as established by virtue of the actions of the biased subordinate or by virtue of the actions of the ultimate decisionmaker.”³⁷¹ The Fourth Circuit based its actual decisionmaker rule, in large part, on agency principles.³⁷² The Fourth Circuit limits liability to those employees to whom the employer delegated supervisory authority.³⁷³ In contrast, the Tenth Circuit requires the biased employee to misuse some form of delegated authority.³⁷⁴ The court did not limit such authority to only supervisory abilities, but held that the “authority to monitor performance, report disciplinary infractions, and recommend employment actions” also sufficed.³⁷⁵

The Tenth Circuit’s approach provides the most balanced answer to the agency question in cat’s paw cases. By disregarding the agency limitation, the lenient courts improperly open the door to automatic liability for all employees’ actions. Instead, courts should apply agency principles because they properly cabin the situations that can expose the employer to cat’s paw liability. The agency limitation relates to the deterrent objective of antidiscrimination legislation. In other words, employers should be held liable for the “discriminatory act of employees that it reasonably may have prevented.”³⁷⁶ Employers have a better opportunity to prevent and monitor misconduct by employees possessing delegated authority than by

³⁷¹ Befort & Olig, *supra* note 8, at 408.

³⁷² Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 287 (4th Cir. 2004) (en banc).

³⁷³ *Id.* at 288–91.

³⁷⁴ EEOC v. BCI Coca-Cola Bottling Co. of L.A., 450 F.3d 476, 487 (10th Cir. 2006).

³⁷⁵ *Id.* at 485.

³⁷⁶ Befort & Olig, *supra* note 8, at 410.

ordinary workers.³⁷⁷ For example, an employer should not be held vicariously liable if a biased customer or independent contractor filed a false report of employee misconduct that caused the employee to be terminated.³⁷⁸ Nor would an employer be liable for an ordinary employee, lacking any delegated authority, falsely reports another employee's misconduct.³⁷⁹

On the other hand, Supreme Court precedent and policy concerns suggest that vicarious liability should not be limited to only formal supervisors. In *Ellerth*, the Supreme Court concluded that vicarious liability exists when a supervisor effectuates a tangible employment action against a subordinate.³⁸⁰ Importantly, however, the *Ellerth* Court did not limit liability to only this context.³⁸¹ Instead, the Court remarked that other circumstances implicating employer liability based on the agency relationship were "less obvious."³⁸² The Supreme Court's decision in *Ellerth* "ultimately stands for the proposition that an employer may be liable for agency purposes when an employee misuses delegated authority that results in an adverse employment action."³⁸³ Consequently, courts have properly determined that cat's paw liability, as a specific branch of vicarious liability, exists when the biased subordinate who causes the adverse employment action is a supervisor.

Yet, just as *Ellerth* explicitly noted, this scenario does not represent the outer bounds of vicarious liability, and liability may be appropriate in other contexts. Employers should also be liable for

³⁷⁷ Brief of Respondent at 23, *EEOC v. BCI Coca-Cola Bottling Co. of L.A.*, 450 F.3d 476 (10th Cir. 2006) (No. 06-341), *cert. dismissed*, 549 U.S. 1334 (2007).

³⁷⁸ *Id.* at 22-23.

³⁷⁹ See White & Krieger, *supra* note 7, at 519-20 (describing scenario where single discriminatory act by an ordinary employee would not give rise to liability because "no action properly attributable to the employer was the product of an intent to discriminate").

³⁸⁰ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 760 (1998).

³⁸¹ *Id.* at 762-63.

³⁸² *Id.* at 763.

³⁸³ Befort & Olig, *supra* note 8, at 412.

employee misuse of different types of delegated authority.³⁸⁴ For example, an employee lacking formal supervisory ability may still be able to make recommendations on issues such as promotion, discipline or termination.³⁸⁵ In fact, the increasing prevalence of peer evaluations suggests that biased coworkers may have just as much power as formal supervisors.³⁸⁶ The biased employee may not hold the title of supervisor, but employer liability would still be proper “if the recommender’s misuse of that lesser form of delegated authority serves as a motivating factor in an adverse employment action.”³⁸⁷ In applying agency principles, courts should not be overly formalistic in focusing only on whether the employee was vested with the appropriate title. Thus, the Fourth’s Circuit’s rigid limitation of liability to only actual decisionmakers misinterprets agency principles. Consistent with the Tenth Circuit, courts should focus on employees with any delegated ability to inflict harm on other employees, instead of being unduly limited to only named supervisors.

CONCLUSION

In conclusion, cat’s paw liability constitutes an important facet of employment discrimination law because it accounts for the changing structure of workplace personnel departments. Yet, as a relatively new legal theory, the cat’s paw doctrine contains several problematic issues that need to be addressed. The current circuit split demonstrates the difficulty courts have faced in applying the doctrine. Although the cat’s paw issue is ripe for review by the Supreme Court, until that time comes the circuit courts should attempt to adopt a uniform and sound approach. In doing so, courts should utilize a motivating factor standard of causation rather than focusing on vague notions of control, influence or involvement. Additionally, courts should more carefully scrutinize whether an employer’s actions sufficiently break the causal

³⁸⁴ *Id.* at 411.

³⁸⁵ *Id.*

³⁸⁶ *See Kaler, supra* note 2, at 1090.

³⁸⁷ *Id.* at 412.

connection so as to be considered an independent investigation. Finally, even after finding causation satisfied, courts should apply agency principles to determine if the employer can be held vicariously liable for the employee's actions. By implementing these suggestions, courts will do justice to the cat's paw metaphor.